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HEWLETT-PACKARD (M) SDN BHD & ANOR v. AGIH TINTA SDN BHD

COURT OF APPEAL, PUTRAJAYA
AZIZAH NAWAWI JCA
CHE MOHD RUZIMA GHAZALI JCA
B SEE MEE CHUN JCA
[CIVIL APPEAL NO: W-02(NCVC)(W)-2554-12-2018]
19 JULY 2022

C **Abstract** – *Cases of high authority are clear on the approach to be taken in the interpretation of contracts. Essentially, one looks at the language of the contract. Where the language is unambiguous and clear, there is no scope to consider the supposed intention of parties and in a choice between competing interpretations, the one which makes more commercial sense shall be preferred.*

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CONTRACT: *Terms – Interpretation – Third party added as affiliate through addendum to main agreement between two parties – Main agreement terminated – Whether third party's status as affiliate terminated upon termination of main agreement – Whether third party merely riding as affiliate through main agreement – Whether there were ambiguity and competing interpretations – Interpretation consistent with commercial sense*

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The appellants were part of the Hewlett-Packard (HP) Group of Companies. In Asia, HP ran a program known as the Most Valuable Customer ('MVC') Program where selected resellers were appointed as MVC resellers and a participating end user was identified as MVC. MVC resellers would bid for tenders to supply HP toners and inks to the MVC. The respondent was one such MVC reseller. Sunlight Universal Corporation Sdn Bhd ('Sunlight') became a HP partner after entering into a contract with the first appellant. Through an addendum between Sunlight and the first appellant, the respondent was later added as an affiliate. A new policy was introduced where all MVC resellers were required to be a HP partner as one of the conditions to be appointed as MVC reseller. The MVC reseller could either enter into a HP partner contract or be an affiliate through an existing HP partner contract. The MVC program was restructured to require the issuance of letters of appointment to each MVC reseller. Three letters of appointment ('LA') were issued to the respondent. The second appellant issued a notice of termination to Sunlight. Two undated letters were also issued by the second appellant to the respondent and Sunlight to state their status as MVC resellers had ceased with immediate effect as the HP partner contract had ended. This prompted the respondent to file a claim against the appellants for breach and wrongful repudiation and/or termination of an agreement. The High Court allowed the respondent's claim and awarded damages accordingly. Hence, the present appeal.

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Held (allowing appeal; setting aside decision of High Court)
Per See Mee Chun JCA delivering the judgment of the court:

(1) The LA was valid until 31 October 2015 and may be renewed subject to the prevailing HP-MVC reseller terms and conditions, in particular the attached Appendix B. These were the eligibility for renewal requirements. Paragraph 1 stated that resellers who wished to take part in the MVC Program must meet and satisfy the criteria and 'must be a HP PPS Commercial Partner'. However, there was no definition of the term. It would, therefore, be necessary to construe this term in light of recognised principles of contract interpretation. (paras 34 & 36)

(2) The respondent understood 'HP PPS commercial partner' as meaning the MVC reseller while the appellants' position was that this meant the commercial partner status gained by having a HP partner contract and that the respondent was previously one, due to its affiliation with Sunlight, who was a HP partner. The appellants' position was consistent with the principles of interpretation of contracts that, where if there is ambiguity and competing interpretations, the interpretation which makes commercial sense ought to prevail. The words 'reseller who wish to take part in HP MVC program … must be a HP PPS commercial partner' had to mean fulfilling another criteria, was consistent with commercial sense. (paras 42 & 43)

(3) The contractual relationship between the parties was based on the LA and the MVC reseller agreement. The LA, in particular Appendix B, and the MVC reseller agreement required the reseller to have a partner agreement. As the respondent did not have any such agreement, it rode on Sunlight's addendum by being an affiliate. When Sunlight's HP agreement was terminated, it followed that the respondent's MVC reseller status stood to be terminated too. This was because the underlying basis for the status, which was the HP partner agreement, no longer subsisted. The respondent was not a stand-alone entity, it was tied to Sunlight as an affiliate. The LA was not a formality but one in which its terms should be given effect to. Once Sunlight's appointment as HP partner was terminated, the respondent's position as MVC reseller had to cease. (paras 65 & 80)

(4) The commercial relationship between the parties was non-exclusive, as clearly stated in the LA. This meant that there were other MVC resellers appointed with similar terms of appointment and all were required to purchase HP products from authorised distributors or risked being terminated. Hence, there was no special relationship where the first appellant reposed trust that the respondent would not contaminate the market by selling counterfeit products. The facts of the case did not warrant a duty of good faith to be implied into the contract. (paras 82 & 83)

Case(s) referred to:

Arnold v. Britton And Others [2015] UKSC 36 ***(refd)***
Aseambankers Malaysia Bhd & Ors v. Shencourt Sdn Bhd & Anor [2014] 2 CLJ 773 CA ***(refd)***
Cathay Pacific Airways Ltd v. Lufthansa Technik AG [2020] EWHC 1789 ***(refd)***
Hamsard 3147 Ltd And Another v. Boots UK Ltd [2013] EWHC 3251 ***(refd)***
Investors Compensation Scheme Ltd v. West Bromwich Building Society [1998] 1 WLR 896 ***(refd)***
Master Strike Sdn Bhd v. Sterling Heights Sdn Bhd [2005] 2 CLJ 596 CA ***(refd)***
Perbadanan Nasional Insurans Sdn Bhd v. Pua Lai Ong [1996] 3 CLJ 321 CA ***(refd)***
Rainy Sky SA And Others v. Kookmin Bank [2012] 1 All ER 1137 ***(refd)***
Rohasassets Sdn Bhd v. Weatherford (M) Sdn Bhd & Anor And Another Appeal [2020] 5 CLJ 202 CA ***(refd)***
Samuel Naik Siang Ting v. Public Bank Bhd [2015] 8 CLJ 944 FC ***(refd)***
SDI Retail Services Ltd v. The Rangers Football Club Ltd [2019] EWHC 1929 ***(refd)***
Seven Seas Industries Sdn Bhd v. Philips Electronic Supplies (M) Sdn Bhd & Anor [2008] 4 CLJ 217 CA ***(refd)***
SPM Membrane Switch Sdn Bhd v. Kerajaan Negeri Selangor [2016] 1 CLJ 177 FC ***(refd)***
TSG Building Services Plc v. South Anglia Housing Ltd [2013] EWHC 1151 ***(refd)***
UTB LLC v. Sheffield United Ltd [2019] EWHC 2322 ***(refd)***
Yam Seng Pte Ltd (A Company Registered In Singapore) v. International Trade Corporation Limited [2013] EWHC 111 ***(refd)***

For the appellants - Cyrus V Das, Chew Kherk Ying, Yeoh Yao Huang & Chong Ker Ling; M/s Wong & Partners
For the respondent - Ambiga Sreenevasan, Shireen Selvaratnam, Gokul Radhakrishnan, Ramesh K Supraniam, Kanarasan Ghandinesen & Velvashini Vembarasan; M/s Ramesh K Supramaniam

[Editor's note: Appeal from High Court, Kuala Lumpur; Suit No: WA-22NCVC-748-11-2016 (overruled).]

Reported by Najib Tamby

JUDGMENT

See Mee Chun JCA:

Introduction

[1] The respondent/plaintiff had filed a claim against the appellants/defendants for the breach, wrongful repudiation and/or termination of an agreement. The High Court Judge (HCJ) allowed its claim and awarded damages accordingly.

[2] The appellants appealed which was allowed by this court. We now give our reasons as follows.

Parties

[3] The appellants are part of the Hewlett-Packard (HP) Group of Companies. As part of a separation exercise undertaken by the HP company sometime in 2015, there was a split of the personal computer (PC) and printer business from the enterprise products and services business. This

separation was implemented globally, including in Malaysia. The first appellant separated its business into two, resulting in the incorporation of the second appellant. The first appellant undertook the enterprise products and services business and the second appellant undertook the PC and printing businesses.

[4] The respondent was and is in the business of amongst others, to sell and supply all types of office stationaries and IT consumables including printers, toners, inks and computer printer services.

[5] Although not to a party to the civil suit, another company needs to be mentioned here. This company is Sunlight Universal Corporation Sdn Bhd (Sunlight) and one Sam Soh is its director and shareholder. It is part of the appellants' case that the respondent is affiliated with Sunlight.

Background Facts

[6] In Asia, HP runs a program known as most valuable customer (MVC) program. The HP regional team in Singapore (HP region) is in charge of managing and issuing all policies and directions pertaining to the MVC program to the respective country office for implementation.

[7] Under the MVC program, selected resellers are appointed as MVC resellers whereas a participating end user is identified as MVC. Generally, MVC resellers will bid for tenders to supply HP toners and inks (HP products) to the MVC. The respondent was one such MVC reseller since about 2001/2002.

[8] There were two types of pricing support to eligible MVC resellers, namely big deal discount (BDD) and default 5% fixed local currency pricing (FLCP). In the context of the respondent, the pricing support was as follows:

(i) Under BDD:

(a) The respondent would inform the first appellant of its intention to tender for a contract with a potential MVC. The first appellant had the sole discretion to determine a fixed pricing discount for the HP products to be supplied in the tender.

(b) The respondent would then determine the sale price for the HP products to be offered in the tender.

(c) Upon winning the tender award, all MVC resellers must purchase the HP products from identified HP authorised distributors at the full purchase price and then sell the relevant HP products to the MVC.

(d) In the present case, all of the respondent's purchases of HP products were made through Sunlight.

(e) The discount on the HP products sold would then be reimbursed by the first appellant to the respondent by way of rebates (MVC rebates), subject to submission of invoices by the respondent and approval thereof by the first appellant.

(ii) Under FLCP:

In the event that the purchase price of the HP products increases during the period of the agreement between a MVC reseller and an end user, the first appellant would pay the MVC reseller a price difference reimbursement.

[9] Sunlight became a HP partner by HP partner contract no. W7850 (contract W7850) entered into with the first appellant dated 27 July 2010 (HP partner).

[10] On 18 June 2012, pursuant to HP partner agreement amendment-add affiliate between Sunlight and the first appellant (addendum), the respondent was added as an affiliate.

[11] Sometime in 2010/2011, HP region introduced a new policy, which according to the appellants, all MVC resellers were required to be a HP partner as one of the conditions to be appointed as MVC reseller. The MVC reseller could either enter into a HP partner contract or be an affiliate through an existing HP partner contract.

[12] In 2013, the MVC program was restructured to require the issuance of letters of appointment to each MVC reseller.

[13] There were three letters of appointment (LA) issued to the respondent. They were dated 22 July 2013 (valid until 31 October 2013), 15 January 2014 (valid until 31 October 2014), and 1 November 2014 (valid until 31 October 2015). There was another document issued dated 7 March 2014 titled "HP most valuable customer program (MVC) reseller program agreement" with a duration from 6 March 2014 to 5 March 2015.

[14] The second appellant issued a notice of termination to Sunlight dated 13 August 2015 whereupon the termination as HP partner was effective on 12 September 2015.

[15] Two undated letters were then issued by the second appellant to the respondent and Sunlight (status change letters) to state that their status as MVC resellers also ceased with immediate effect as the HP partner contract had ended.

High Court's Decision

[16] The HCJ found that the respondent was not affiliated to Sunlight. The insertion of the respondent by way of the addendum to Sunlight's HP partner contract no. W7850, at best, showed that Sunlight had unilaterally added the respondent as its affiliate. It did not bind the respondent who was not a party to the HP partner contract. On the appellants' contention that the respondent was a bumiputra front for Sunlight, it was held there was no plea to lift the corporate veil and no evidence that Sunlight controlled the respondent.

[17] The HCJ further found that the second appellant had no *locus* to issue the change status letter where there was no privity of contract between the second appellant and the respondent. The letter was a manifestation of a

wrongful act on the appellants' part. The contention that the second appellant could not be a party to the suit as there was no privity was not accepted since the second appellant had issued the letter and it was therefore a necessary party. Although it was said the MVC business was transitioned to the second appellant, there was no assignment or novation or notice given to the respondent that the LA was being assigned or taken over by the second appellant.

[18] The LA dated 1 November 2014 did not state that if the respondent is not a HP PPS commercial partner or an affiliate of a T2 partner, then it ceases to be a MVC reseller. There was no definition in the LA or appendix B and there was nothing to link the term HP PPS commercial partner with Sunlight's HP partner contract or the addendum.

[19] The entire agreement clause in the LA dated 1 November 2014 did not preclude necessary and relevant terms to be implied as a matter of business efficacy and reasonableness. It was not tightly worded such that the LA is impervious to terms being implied into the contract. The appellants had not proved the entire contractual relationship was solely predicated on the terms of the LA. The first appellant had stated it was only the aforesaid LA which governed the relationship and yet it looked elsewhere for the definition of HP PPS commercial partner.

[20] The HCJ was not convinced that the cut-off date of 31 October 2015 was in fact cast in stone. This date was probably a convenient contractual date for the first appellant to utilise if something went wrong with the relationship. The reality and the expectation all along was that all things being equal, there would be "auto renewal" of the respondent as MVC reseller.

[21] On the obligation of good faith, the HCJ referred to *Yam Seng Pte Ltd (A Company Registered In Singapore) v. International Trade Corporation Limited* [2013] EWHC 111 that in certain specific long term or "relational" contracts, terms such as good faith, honesty and transparency may be implied to give effect to the unexpressed intentions of the parties. The relationship that existed between the first appellant and the respondent since 2011 to 2015 was self-evidently a long-term relationship predicated on honesty and trust between the parties. The content of good faith would necessarily be an obligation on the first appellant to ensure continuity of the respondent's status as MVC reseller except where misconduct is proven.

[22] According to the HCJ, the issue of Sundata Sdn Bhd (Sundata) being given preferential treatment dovetailed into another aspect of the first appellant's good faith obligation. Sundata was caught selling counterfeit products and were due to be deactivated which never happened. The evidence that there was a romantic relationship between one Lim Kym Jye (Ms Lim/DW2) and Leonard Lee from Sundata was found to feed the theory and established on a balance of probabilities that the respondent was booted

out to make way for Sundata who was not even a T2 partner. There was thus a complete absence of good faith on the first appellant's part because Ms Lim had placed herself in a position of conflict such that Sundata was given preferential treatment.

[23] The first appellant had committed a breach of the implied duty to act with good faith and honesty in permitting the second appellant (who had no *locus standi*) to wrongfully terminate the respondent's MVC contract and in wrongfully discontinuing the supply of HP products and MVC rebates.

[24] In regard to damages, the HCJ accepted the report prepared by William Yue Chi Kin (PW5) entitled financial verification on sales, purchasers and HP rebates (Vol. 2 – 30 June 2012, 30 June 2013 and 30 June 2014). The respondent's actual profit per annum over the period of three years was RM2,658,217.24. There was no rebuttal evidence from the appellants other than to challenge PW5's credibility. PW5 had been convicted for an offence of making a misleading statement where a particular company's profit before tax was inflated by about 26%. The appeal is pending and a stay of execution of the sentence has been obtained. The HCJ took the position that being convicted did not mean the evidence was worthless. Having looked at the report and the method of evaluation, it cannot be said the approach was erroneous or indefensible. The appellants could have produced their auditor's or financial expert's opinion. It was found the report could be accepted to arrive at the annual profit of the respondent.

[25] General damages of RM2,658,217.24 for MVC rebates and loss of future profits for two years of RM5,236,397.74 were awarded.

Our Decision

[26] We do not intend to set out the respective submissions of parties separately but will address them in the course of the decision.

[27] We note that in paras. 16 to 21 of the amended statement of claim, the respondent pleaded three MVC LAs, the MVC reseller agreement and conduct as the contractual basis of its claim. In para. 21 it was then stated "collectively, the foregoing constitutes an agreement between HP and Agih Tinta, referred to herein as the "MVC agreement". These thus formed the basis of its claim.

[28] As stated earlier, there were three LAs issued. They were dated 22 July 2013 (valid until 31 October 2013), 15 January 2014 (valid until 31 October 2014), and 1 November 2014 (valid until 31 October 2015).

Terms Of LA

[29] We start by considering the LA dated 1 November 2014 (CB4/30) which is the last appointment letter of the respondent as MVC reseller, prior to its termination. This is because the respondent had relied on it as a document forming part of the MVC agreement. The LA stated as follows:

We are very pleased to inform you that you are hereby appointed as a non-exclusive HP MVC Reseller.

This Letter of Appointment, HP MVC Program Reseller Benefit Sheet (attached hereto as Appendix A), together with the enclosed HP MVC Resellers Terms & Guidelines (attached hereto as Appendix B) and any appendices thereto (hereinafter collectively referred to as "the HP MVC Reseller Terms and Conditions") serve to confirm the entire terms and conditions of the appointment herein.

The HP MVC Reseller Terms and Conditions may be revised by HP from time to time at its absolute discretion.

Eligibility for renewal

The appointment herein will be valid until 31th October 2015 and may be renewed subject to the prevailing HP MVC Reseller Terms and Conditions.

Any renewal shall be contingent upon, among others, HP MVC Reseller's past performance, meeting and continuing to meet HP's eligibility requirements, including any annual volume commitment requirements and non-violation of all the terms and conditions as stated in Appendix B.

[30] The appointment was accepted by the respondent and it agreed to be bound by the HP-MVC reseller terms and conditions.

[31] In the aforesaid HP-MVC reseller terms and conditions attached as appendix B, para. 1(ii) stated the following:

1. Resellers who wish to take part in HP MVC Program must meet and satisfy all of the following criteria:

...

(ii) Must be a HP PPS Commercial partner.

[32] There are other paragraphs worthy of note and are as follows:

(i) Clause 5i – "[...] All MVC accounts & partnership will be terminated if the reseller partner found to guilty with fraud, counterfeit, remanufactured and/or refilled."

(ii) Clause 9ii – "Submitting fraudulent claims transactions, documents and invoices is strictly prohibited."

(iii) Clause 13 – "HP reserves the right to audit all resellers on all MVC account".

(iv) Clause 10 – "In the event of any non-adherences to cls. 9(i, ii, iii, iv, vi), HP reserves the right to take the following actions: a) All pending rebates *ie,* partner pay for result (PPFR) will be forfeited, b) reseller will be immediately terminated from MVC reseller list and participation of supplies quarterly incentives and *ad-hoc* promotions."

(e) Clause 14 – "Termination of reseller participation in MVC program is with immediate effect without further notice if reseller is found: (i) failing HP MVC program audit."

[33] We add that the earlier two LAs contained essentially the same provisions.

[34] The LA is for the respondent's appointment as a non-exclusive HP MVC reseller. It is valid until 31 October 2015 and may be renewed subject to the prevailing HP-MVC reseller terms and conditions, in particular the attached appendix B. These are the eligibility for renewal requirements. Paragraph 1 states that resellers who wish to take part in HP MVC program must meet and satisfy the following criteria, and in (ii) "must be a HP PPS commercial partner".

[35] In the HP most valuable customer program (MVC) reseller program agreement (CB5/32-35), which is also a document for renewal, cl. 1 states the following:

> The following are the terms and conditions of this agreement.
>
> 1. All Reseller in this program must sign a "HP Partner Agreement (T2)" with HP. In the event of any conflict between these Terms and the HP Partner Agreement, these Terms will govern any subject matter of this Program.

Interpretation Of HP PPS Commercial Partner

[36] It would thus seem clear that to be eligible for renewal as MVC reseller, the reseller must be a HP PPS commercial partner (appendix B). There is however no definition of the term. It would therefore be necessary to construe this term in the light of recognised principles of contract interpretation.

[37] Cases of high authority are clear on the approach to be taken in the interpretation of contracts as set out below. Essentially, one looks at the language of the contract, where the language is unambiguous and clear there is no scope to consider the supposed intention of parties and in a choice between competing interpretations, the one which makes more commercial sense should be preferred.

[38] The House of Lords in *Investors Compensation Scheme Ltd v. West Bromwich Building Society* [1998] 1 WLR 896 (ICS) propounded the principles of contractual interpretation at pp. 912 to 913 as follows:

> The principles may be summarised as follows
>
> (1) Interpretation is the ascertainment of the meaning which the document would convey to a reasonable person having all the background knowledge which would reasonably have been available to the parties in the situation in which they were at the time of the contract.

(2) The background was famously referred to by Lord Wilberforce as the "matrix of fact," but this phrase is, if anything, an understated description of what the background may include. Subject to the requirement that it should have been reasonably available to the parties and to the exception to be mentioned next, it includes absolutely anything which would have affected the way in which the language of the document would have been understood by a reasonable man.

(3) The law excludes from the admissible background the previous negotiations of the parties and their declarations of subjective intent. They are admissible only in an action for rectification. The law makes this distinction for reasons of practical policy and, in this respect only, legal interpretation differs from the way we would interpret utterances in ordinary life. The boundaries of this exception are in some respects unclear. But this is not the occasion on which to explore them.

(4) The meaning which a document (or any other utterance) would convey to a reasonable man is not the same thing as the meaning of its words. The meaning of words is a matter of dictionaries and grammars; the meaning of the document is what the parties using those words against the relevant background would reasonably have been understood to mean. The background may not merely enable the reasonable man to choose between the possible meanings of words which are ambiguous but even (as occasionally happens in ordinary life) to conclude that the parties must, for whatever reason, have used the wrong words or syntax:

(5) That "rule" that words should be given their "natural and ordinary meaning" reflects the common-sense proposition that we do not easily accept that people have made linguistic mistakes, particularly in formal documents. On the other hand, if one would nevertheless conclude from the background that something must have gone wrong with the language, the law does not require judges to attribute to the parties an intention which they plainly could not have had. Lord Diplock made this point more vigorously when he said in *Antaios Compania Naviera S.A. v. Salen Rederierna A.B.* [1985] A.C. 191, 201:

> If detailed semantic and syntactical analysis of words in a commercial contract is going to lead to a conclusion that flouts business common sense, it must be made to yield to business common sense.

[39] It has been said in *Rainy Sky SA And Others v. Kookmin Bank* [2012] 1 All ER 1137 at para. 23 "Where the parties have used unambiguous language, the court must apply it" and at para. 30 "where a term of contract is open to more than one interpretation, it is generally appropriate to adopt the interpretation which is more consistent with business common sense".

[40] In *Arnold v. Britton And Others* [2015] UKSC 36 the following was stated:

> [15] When interpreting a written contract, the court is concerned to identify the intention of the parties by reference to 'what a reasonable person having all the background knowledge which would have been available to the parties would have understood them to be using the language in the contract to mean', to quote Lord Hoffmann in *Chartbrook Ltd v. Persimmon Homes Ltd* [2009] UKHL 38, [2009] 4 All ER 677, [2009] AC 1101 (at [14]). And it does so by focusing on the meaning of the relevant words, in this case cl 3(2) of each of the 25 leases, in their documentary, factual and commercial context. That meaning has to be assessed in the light of (i) the natural and ordinary meaning of the clause, (ii) any other relevant provisions of the lease, (iii) the overall purpose of the clause and the lease, (iv) the facts and circumstances known or assumed by the parties at the time that the document was executed, and (v) commercial common sense, but (vi) disregarding subjective evidence. ...
>
> [16] For present purposes, I think it is important to emphasise seven factors.
>
> [17] First, the reliance placed in some cases on commercial common sense and surrounding circumstances (*eg*, in *Chartbrook*, paras [16] [26]) should not be invoked to undervalue the importance of the language of the provision which is to be construed. The exercise of interpreting a provision involves identifying what the parties meant through the eyes of a reasonable reader, and, save perhaps in a very unusual case, that meaning is most obviously to be gleaned from the language of the provision. Unlike commercial common sense and the surrounding circumstances, the parties have control over the language they use in a contract. And, again save perhaps in a very unusual case, the parties must have been specifically focusing on the issue covered by the provision when agreeing the wording of that provision.
>
> [18] Secondly, when it comes to considering the centrally relevant words to be interpreted, I accept that the less clear they are, or, to put it another way, the worse their drafting, the more ready the court can properly be to depart from their natural meaning. ...
>
> [19] The third point I should mention is that commercial common sense is not to be invoked retrospectively. The mere fact that a contractual arrangement, if interpreted according to its natural language, has worked out badly, or even disastrously, for one of the parties is not a reason for departing from the natural language, Commercial common sense is only relevant to the extent of how matters would or could have been perceived by the parties, or by reasonable people in the position of the parties, as at the date that the contract was made. ...

[20] Fourthly, while commercial common sense is a very important factor to take into account when interpreting a contract, a court should be very slow to reject the natural meaning of a provision as correct simply because it appears to be a very imprudent term for one of the parties to have agreed, even ignoring the benefit of wisdom of hindsight. The purpose of interpretation is to identify what the parties have agreed, not what the court thinks that they should have agreed. ...

[21] The fifth point concerns the facts known to the parties. When interpreting a contractual provision, one can only take into account facts or circumstances which existed at the time that the contract was made, and which were known or reasonably available to both parties. ...

[22] Sixthly, in some cases, an event subsequently occurs which was plainly not intended or contemplated by the parties, judging from the language of their contract. in such a case, if it is clear what the parties would have intended, the court will give effect to that intention ...

[41] *SPM Membrane Switch Sdn Bhd v. Kerajaan Negeri Selangor* [2016] 1 CLJ 177; [2016] 1 MLJ 464 at p. 478, para. 27 stated that ICS provided a helpful starting point to the principles of interpretation of contracts. It also considered *Arnold* and agreed on "the natural meaning of the words when giving effect to a contract" (at [39]). The Federal Court further held that "when one has to choose between two competing interpretations, the one which makes more commercial sense should be preferred if the natural meaning of the words is unclear." (at [178]). It was also affirmed at para. [92] that "if the parties had used unambiguous language, the court must apply the language."

[42] As to what HP PPS contract partner meant, the respondent's understanding through PW3 (Mazlan bin Daud, managing director), meant "MVC reseller, partners la" (CB2/131) which is to say HP PPS commercial partner was MVC reseller. The appellants' position was that this meant the commercial partner status gained by having a HP partner contract and that the respondent was previously one, due to its affiliation with Sunlight, who was a HP partner.

[43] We agree with the appellants' position as this is consistent with the principles of interpretation of contracts that where if there is ambiguity and competing interpretations, the interpretation which makes commercial sense ought to prevail. The words "reseller who wish to take part in HP MVC program ... must be a HP PPS commercial partner" has to mean fulfilling another criteria, is consistent with commercial sense. The closest to HP PPS commercial partner has to be HP partner and considering too that the new policy introduced in 2010/2011 where all MVC resellers had to be a HP partner. On the other hand, the respondent's understanding that HP PPS

commercial partner meant reseller would render those words a tautology as it meant that by virtue of being a reseller, it had already met the condition of being a HP PPS commercial partner.

[44] Further, the document for renewal referred to earlier, namely HP most valuable customer program (MVC) reseller program agreement also had a condition that resellers must sign a HP partner agreement.

[45] We therefore find that consistent with the principles of contractual interpretation, the term HP PPS commercial partner must necessarily mean a HP partner.

Addendum And Affiliate

[46] It is not disputed that the respondent was not a HP partner. However, Sunlight was, by virtue of Contract No. W7850 dated 27 July 2010 (CB4/9-27). On 18 June 2012, pursuant to the addendum between Sunlight and the first appellant, the respondent was added as an affiliate (CB4/28-29). This is significant as it meant that the respondent could now ride on the addendum and was qualified to become a MVC reseller pursuant to its affiliation with Sunlight. It was held by the HCJ that at best, the addendum only showed that Sunlight had unilaterally added the respondent and cannot bind the respondent. However, we find that the appellants' case was that the respondent had to be a HP partner or ride on an affiliation, which was what happened here. As the evidence showed, the respondent was aware of it being added as an affiliate.

[47] It cannot be as claimed by the respondent that it was not aware of the addendum and the affiliation. There were email exchanges between the first appellant and the respondent where Sunlight was kept in the loop (CB3/11). The evidence showed that PW4 (Tan Ai Ling, Sunlight's employee) was responsible to handle the entire MVC claim process on behalf of the respondent, from the submission of tender information to the first appellant until the claim for MVC rebates. It was PW3's evidence he assigned the management of the MVC claim process solely to PW4. PW3's further evidence was that he had been informed by Sam Soh from Sunlight that the respondent would be terminated; he wanted to appeal whereupon Sam said since PW3 did not know the regional people, "jadi dia beri tolong buat sekali juga la. Jadi dia kawan lama nak tolong, jadi saya setujulah" (CB2/134). This effectively meant PW3 left the matter of the appeal to be done on the respondent's behalf by Sunlight.

[48] If not for the affiliation, the respondent would not be able to make discounted sales and to claim rebates from the first appellant. So, for instance, CB4/109-112 shows the respondent sending its tax invoice for rebate to Sunlight who in turn submits to the first appellant and when approved, the first appellant sends to Sunlight who sends to the respondent.

[49] Further, a pre-litigation letter dated 23 September 2015 (CB4/84-85) was issued by the same set of solicitors acting for both Sunlight and the respondent wherein it was stated in para. 4 "against our client and our client's associate company Agih Tinta Sdn Bhd". There was another solicitor's letter dated 11 January 2016 (CB4/86-87) which was issued on behalf of both Sunlight and the respondent where reference was made to the notice of termination and yet, there was no mention about the respondent not being an affiliate.

[50] All these show the respondent's knowledge of its affiliation to Sunlight when it was added by the addendum and the events post termination equally showed the same.

[51] Hence it was not necessary to go into control of the respondent by Sunlight and that there was no pleading to lift the corporate veil.

[52] The argument was advanced that there was no document to link HP PPS commercial partner with contract. The link is in the addendum where earlier we found there to be a requirement to be a HP partner in order to be a MVC reseller and that the respondent rode on the addendum by being added as an affiliate.

[53] "Affiliate" is defined in contract W7850 as "affiliate of a party means an entity controlling, controlled by, or under common control with that party". The fact of the respondent being added by the addendum would bear testimony to this.

Termination Of Sunlight As HP Partner

[54] Sunlight was terminated as a HP partner with effect from 12 September 2015 for audit failures. This effectively meant the respondent could no longer ride on the addendum as an affiliate and no longer met the eligibility requirements to continue as a MVC reseller. The second appellant issued undated change status letters to both Sunlight and the respondent. They essentially said the same thing. With regard to the respondent, it was stated:

> RE: MVC Reseller Status
>
> Given the channel partner agreement W7850 with you has ended and as you are now a non contracted partner, please be advised that your current status as MVC channel partner shall also cease with immediate effect.

[55] Although the aforesaid letter was undated, it is most probable the termination date would be 12 September 2015, which is the day that Sunlight's termination as HP partner took effect. This is also consistent with para. 23 of ASOC where it was pleaded that in September 2015, letters were issued to the respondent's MVC customers that the respondent was no longer a HP MVC reseller.

[56] It was held by the HCJ the second appellant had no *locus* to issue the aforesaid letter as it was not a party to the LA and there had been no novation or assignment of the first appellant's contractual rights under the LA. In this regard, we agree with the appellants' submission that it was never the pleaded case of the respondent, that the second appellant did not have the authority to issue the change status letter which was termed the impugned letter. The pleaded case was always a wrongful repudiation of the contract based on a legitimate expectation of automatic renewal and the notion of good faith. We refer to *Samuel Naik Siang Ting v. Public Bank Bhd* [2015] 8 CLJ 944 at para. 30 that "where a vital issue was not raised in the pleadings it could not be allowed to be argued and to succeed on appeal".

[57] The above thus deals with the eligibility requirements in that a MVC reseller has to be a HP partner, that the respondent became Sunlight's affiliate by virtue of the addendum and that once Sunlight was no longer a HP partner, the respondent's status as a MVC reseller also ceased.

Duration

[58] We further find that there were other terms of the contract which were not correctly construed. The first relates to the duration of the LA (CB4/30) wherein it was stated in paras. 4 and 5:

> **Eligibility for renewal**
>
> The appointment herein will be valid until 31th October 2015 and may be renewed subject to the prevailing HP MVC Reseller Terms and Conditions.
>
> Any renewal shall be contingent upon, among others, HP MVC Reseller's past performance, meeting and continuing to meet HP's eligibility requirements, including any annual volume commitment requirements and non-violation of all the terms and conditions as stated in Appendix B.

[59] A reading of this provision would mean the respondent's appointment "will be valid until 31 October 2015 and may be renewed". The renewal is thus discretionary where the word "may" implies a mere direction or discretion as per *Perbadanan Nasional Insurans Sdn Bhd v. Pua Lai Ong* [1996] 3 CLJ 321, 333. It could not therefore be said as was held by the HCJ that he was not convinced the cut-off date of 31 October 2015 was in fact cast in stone and that it was possibly a convenient contractual date for the first appellant to utilise if something went wrong with the contractual relationship. The finding that the respondent's term could be extended for a further two years runs counter to the express fixed term clause of para. 2 of the LA. The plain and ordinary meaning of para. 2 oughts to be given effect to.

Entire Agreement Clause

[60] The second provision relates to the entire agreement clause contained in para. 2 of the LA (CB4/30) as follows:

This Letter of Appointment, HP MVC Program Reseller Benefit Sheet (attached hereto as Appendix A), together with the enclosed HP MVC Resellers Terms & Guidelines (attached hereto as Appendix B) and any appendices thereto (hereinafter collectively referred to as "the HP MVC Reseller Terms and Conditions") serve to confirm the entire terms and conditions of the appointment herein.

[61] Here, we are guided by a decision of this court in *Master Strike Sdn Bhd v. Sterling Heights Sdn Bhd* [2005] 2 CLJ 596; [2005] 3 MLJ 585 which explained the purpose and scope of entire agreement clauses. At p. 607 (CLJ); pp. 593 to 594 (MLJ), the following was said:

Clause 24 is an entire agreement clause that constitutes a binding agreement between the appellant and the respondent with regard to all the matters mentioned in the contract and therefore, in our judgment, the contract does not permit any term to be implied or import any other considerations not in the contract. In *Innterpreneur Pub Co v. East Crown Ltd* [2000] 3 EGLR 31 at p 32 K-L right a somewhat similar provision to cl. 24 is set out. In his judgment, Lightman J opined on the purpose and the effect of an entire agreement where at p 33 A-B left he said:

> The purpose of an entire agreement clause is to preclude a party to a written agreement from threshing through the undergrowth and finding, in the course of negotiations, some (chance) remark or statement (often long forgotten or difficult to recall or explain) upon which to found a claim, such as the present, to the existence of a collateral warranty. The entire agreement clause obviates the occasion for any such search and the peril to the contracting parties posed by the need that may arise in its absence to conduct such a search. For such a clause constitutes a binding agreement between the parties that the full contractual terms are to be found in the document containing the clause and not elsewhere, and that, accordingly, any promises or assurances made in the course of the negotiations (which, in the absence of such a clause, might have effect as a collateral warranty) shall have no contractual force, save in so far as they are reflected and given effect in that document.

[62] The HCJ was of the considered view that the appellants were looking elsewhere for the definition of HP PPS commercial partner and had thus taken themselves out of the LA and descended on contract W7850 and the addendum such that the entire agreement clause was no more.

[63] However, we find that what the appellants are seeking is to rely on extrinsic evidence as an aid to interpret a provision in the MVC contract and not rely on extrinsic evidence to contradict, vary, add to or subtract from the express written terms. This is permitted by *SPM Membrane* at p. 482 as follows:

[37] Therefore, the view is that the common law at that time permitted extrinsic evidence of surrounding circumstances to aid in the interpretation of words used in a contract, which is transferred into the Evidence Act as effected in s. 92(f). This includes extrinsic evidence of

A facts and circumstances which were (or ought to have been) in the mind of the (drafter) when he used those words. However, this does not extend itself to parole evidence of a drafter's subjective intention so as to include it within the surrounding circumstances.

[38] Therefore, the question of admissibility of extrinsic evidence is governed by the rules of evidence which can be found in the Evidence Act and the common law. Section 92(f) of the Act must be read in conjunction with ss. 93 and 94. While extrinsic evidence of surrounding circumstances is generally admissible under s. 92(f), parole evidence of the drafter's intentions remains generally inadmissible. This explains the qualification of the second ICS principles in the Malaysian context.

[64] The entire agreement clause would thus preclude the implying of a two-year extension into the LA. It would not however preclude the appellants from referring beyond the LA for a commercially sensible interpretation of HP PPS commercial partner as this is extrinsic evidence as an aid to interpret a provision. The principles of contractual interpretation in fact allows for it when faced with competing interpretations where the meaning is unclear.

The Respondent Was No Longer A MVC Reseller

[65] We therefore conclude on this note that the contractual relationship between the parties was based on the LA and MVC reseller agreement. The LA, in particular appendix B, and the MVC reseller agreement required the reseller to have a partner agreement. As the respondent did not have any such agreement, it rode on Sunlight's addendum by virtue of being an affiliate. When Sunlight's HP agreement was terminated, it followed that the respondent's MVC reseller status stand to be terminated too. This is because the underlying basis for the status, which is the HP partner agreement, was no more (no longer subsisted). The respondent was not a stand-alone entity; it was tied to Sunlight as an affiliate. The LA was also not a formality but one in which its terms should be given effect to. On this ground alone, the appeal should be allowed.

Good Faith

[66] For completeness, we considered the obligation of good faith, as that was the basis upon which the claim was allowed. We say that there was no such obligation given that the terms of the contract did not require such an obligation to be implied.

[67] The long-standing relationship of the parties was a factor which weighed heavily in the mind of the HCJ where it was held to be predicated on the edifice of honesty and trust between the parties. Reference was made to *Yam Seng* at the following paragraphs:

[141] What good faith requires is sensitive to context. That includes the core value of honesty. In any situation it is dishonest to deceive another person by making a statement of fact intending that other person to rely on it while knowing the statement to be untrue. Frequently, however, the

requirements of honesty go further. For example, if A gives information to B knowing that B is likely to rely on the information and A believes the information to be true at the time it is given but afterwards discovers that the information was, or has since become, false, it may be dishonest for A to keep silent and not to disclose the true position to B. Another example of conduct falling short of a lie which may, depending on the context, be dishonest is deliberately avoiding giving an answer, or giving an answer which is evasive, in response to a request for information.

[142] In some contractual contexts the relevant background expectations may extend further to an expectation that the parties will share information relevant to the performance of the contract such that a deliberate omission to disclose such information may amount to bad faith. English law has traditionally drawn a sharp distinction between certain relationships such as partnership, trusteeship and other fiduciary relationships on the one hand, in which the parties owe onerous obligations of disclosure to each other, and other contractual relationships in which no duty of disclosure is supposed to operate. Arguably at least, that dichotomy is too simplistic. While it seems unlikely that any duty to disclose information in performance of the contract would be implied where the contract involves a simple exchange, many contracts do not fit this model and involve a longer term relationship between the parties which they make a substantial commitment. Such relational contracts, as they are sometimes called, may require a high degree of communication, cooperation and predictable performance based on mutual trust and confidence and involve expectations of loyalty which are not legislated for in the express terms of the contract but are implicit in the parties' understanding and necessary to give business efficacy to the arrangements. Examples of such relational contracts might include some joint venture agreements, franchise agreements and long term distributorship agreements.

...

[144] Although its requirements are sensitive to context, the test of good faith is objective in the sense that it depends not on either party's perception of whether particular conduct is improper but on whether in the particular context the conduct would be regarded as commercially unacceptable by reasonable and honest people. The standard is thus similar to that described by Lord Nicholls in a different context in his seminal speech in *Royal Brunei Airlines v. Tan* [1995] 2 AC 378 at pp. 389-390, [1995] 3 All ER 97, [1995] 3 WLR 64. This follows from the fact that the content of the duty of good faith is established by a process of construction which in English law is based on an objective principle. The court is concerned not with the subjective intentions of the parties but with their presumed intention, which is ascertained by attributing to them the purposes and values which reasonable people in their situation would have had.

[68] We observe that even in *Yam Seng*, a doubt was expressed that English law has reached a stage where it is ready to recognise a requirement of good faith as a duty to be implied. This was so stated at para. 131 as follows:

A [131] Under English law a duty of good faith is implied by law as an incident of certain categories of contract, for example contracts of employment and contracts between partners or others whose relationship is characterised as a fiduciary one, I doubt that English law has reached the stage, however, where it is ready to recognise a requirement of good faith as a duty implied by law, even as a default rule, into all commercial B contracts. Nevertheless, there seems to me to be no difficulty, following the established methodology of English law for the implication of terms in fact, in implying such a duty in any ordinary commercial contract based on the presumed intention of the parties.

[69] Further *Yam Seng* was a case involving an exclusive distributorship C whereas the LA here was non-exclusive.

[70] Cases since *Yam Seng* have shown a reticence on the part of the courts in not implying the duty of good faith into commercial contracts, in particular on termination.

D **[71]** In *TSG Building Services Plc v. South Anglia Housing Ltd* [2013] EWHC 1151 (TCC) it was said at para. 51:

[51] I do not consider that there was as such an implied term of good faith in the Contract. The parties had gone as far as they wanted in expressing terms in cl. 1.1 about how they were to work together in a spirit of trust E fairness and mutual cooperation and to act reasonably. Even if there was some implied term of good faith, it would not and could not circumscribe or restrict what the parties had expressly agreed in cl. 13.3, which was in effect that either of them for no, good or bad reason could terminate at any time before the term of four years was completed. That is the risk that each voluntarily undertook when it entered into the Contract, even F though, doubtless, initially each may have thought, hoped and assumed that the Contract would run its full term. Obviously, if South Anglia (and there is no suggestion of this) misrepresented prior to the Contract that it intended to proceed to the full term in circumstances when it was always planning to terminate early, that could give rise to a separate cause of action for one type of misrepresentation or another. Again, if (and G there is similarly no suggestion of this) there was some material fraud or dishonesty on the part of South Anglia in and about the termination that might well give rise to some cause of action. Thus, if there were extreme and unusual facts (none being adumbrated so far), the law may well provide TSG with some other remedy.

H **[72]** *Hamsard 3147 Ltd And Another v. Boots UK Ltd* [2013] EWHC 3251 essentially refused to imply a good faith term into a supply agreement. It held at para. 88:

[88] Boots had a contractual right to terminate the relationship on reasonable notice. It was free to exercise that right according to its terms. I The right was not subject to a qualification that it could only be exercised in good faith and so as to maximise the Net Profit generated under the Agreement.

[73] We then have *SDI Retail Services Ltd v. The Rangers Football Club Ltd* [2019] EWHC 1929 (Comm) with its cautionary word at para. 82 that "considerable care needs to be taken before implying a term of good faith into a commercial contract". A

[74] In *UTB LLC v. Sheffield United Ltd* [2019] EWHC 2322, another cautionary note was given in para. 204 that: B

> ... the greater part of that context is the express terms of the contract. Thus, to imply a general obligation to act at all times in good faith towards the counterparty because the contract is a relational contract may fail to have regard to rights and obligations created by the express terms, to which any implied obligation must be tailored if it is not to be excluded as being inconsistent with them. C

[75] Most recently in *Cathay Pacific Airways Ltd v. Lufthansa Technik AG* [2020] EWHC 1789 at para. 218 the key principles on the good faith requirement were set out as follows: D

> 218. Whilst the law is clearly still in a state of development, I find that the present state of the law in this area can be summarised as follows:
>
> (a) A term of good faith may be implied in a relational contract as a matter of law under the principles set out by Lord Wilberforce in *Liverpool City Council v. Irwin* subject to any contrary express term see *Sheihk Tahnoon* para [174] and *UTB* [200]. E
>
> (b) The test for incorporation as a matter of law is whether the contract is a long-term contract which requires the parties to collaborate in future in ways that respects the spirit and the objectives of their joint venture but which the parties have not specified or have been unable to specify in detail. The contract will also involve trust and confidence that each party will act with integrity and co-operatively – *Sheihk Tahnoon* para [174] and *UTB* [200], F
>
> (c) A good faith term may be implied as a matter of fact in a relational contact but there is not special rule for incorporation in a relational contract. Each term must be considered against the usual test for implied terms – *Globe Motors, Inc v. TRW Lucas Varity Electric Steering Ltd* [2016] EWCA Civ 396 at para [68], G
>
> (d) The main test of whether a term of good faith is to be implied in a contract is whether a reasonable reader of it would consider the term to be so obvious as to go without saying or the term is necessary for business efficacy – *UTB LLC v. Sheffield United Ltd* [2019] EWHC 2322 (Ch) at [196] to [205]; *Russell v. Cartwright* [2020] EWHC 41 (Ch) *Yam Seng Pte v. International Trade Corp* [2013] EWHC 111 (QB), all of which applied the test in *Marks And Spencer Pic v. BNP Paribas Securities Services Trust Co (Jersey) Ltd And Another* [2016] AC 742 at [16] to [31], H I
>
> (e) The overall character of the contract is an important consideration. In relation to this question the indicia in paragraph 725 of *Bates* may be helpful,

(f) The implication of a good faith term as a matter of fact is possible even in the case of long, complex and sophisticated contracts expressed in writing see e g. *Bates And Amey Birmingham Highways Ltd v. Birmingham City Council* [2018] EWCA Civ 264.

[76] Over on our shores, the implication of good faith in a commercial contract has not been accepted. In *Seven Seas Industries Sdn Bhd v. Philips Electronic Supplies (M) Sdn Bhd & Anor* [2008] 4 CLJ 217; [2008] 5 MLJ 157 it was said by this court at pp. 231 to 232 (CLJ); pp. 169 and 170 (MLJ) as follows:

> [27] It is true that there is a close relationship between the parties in the carrying out of their respective functions and obligations under the contract but it is not such giving rise to a fiduciary relationship. Their close relationship can be attributed to the nature of the contract and their respective obligations thereunder. The terms of the contract stipulate that the appellant will provide labour force, manufacturing facilities and office space, while the respondents will provide the material required for the manufacture of loaders. The respondents also set out the manufacturing process, and determine the technical and other specifications, to be complied by the appellant. It also appears to us that the other terms of the contract are substantially similar to other form of contracts for service with provisions on claims for late delivery, payment and calculation of fees payable. For the reasons aforesaid, we agree with the learned judge that the parties' relationship is not based on trust and confidence. It is a mere principal-contractor relationship.
>
> ...
>
> [31] We would add that there is also justification in the termination of the contract. The appellant in its letter dated 4 November 1997 to the respondents admitted that it faced manpower problem to meet substantial volume increases apart from the problem with its contractor. Then there are the minutes of the meeting held on 8 November 1997 between the appellant's management and the representative of the respondents which showed that the appellant was facing manpower crisis coupled with shortage of trained staff and high turnover. These internal problems experienced by the appellant in our view constitute reasonable grounds for the respondents to terminate the contract by giving the requisite six months notice. Further, we are also in agreement with the learned counsel for the respondents that the appellant has in fact acquiesced in the termination when it asked the respondents to leave its premises before the expiry of the said six months period.

[77] Similarly, in *Aseambankers Malaysia Bhd & Ors v. Shencourt Sdn Bhd & Anor* [2014] 2 CLJ 773; [2014] 4 MLJ 619 it was stated at p. 825 (CLJ); p. 666 (MLJ):

> [126] ... I add that a 'breach of duty of good faith' is not a cause of action and there is no general duty of good faith in common law.'

[78] Reference may also be made to *Rohasassets Sdn Bhd v. Weatherford (M) Sdn Bhd & Anor And Another Appeal* [2020] 5 CLJ 202; [2019] 6 MLJ 501 dealing with a dispute on a tenancy agreement affirmed that: "Perkasa's allegation of bad faith or *mala fides* on the part of the defendants in its

negotiations with Perkasa is without merit as on the facts and on the law there is no contractual duty of good faith in respect of parties dealing at arm's length in respect of a commercial transaction."

[79] From the cases as referred to, we can therefore surmise there is no general implied duty of good faith in commercial contracts and the court should be slow to imply such a duty. Such a duty cannot be implied contrary to the express terms of the contract.

[80] On the facts of the case, we have already found that the proper interpretation of the MVC contract was such that there was a requirement for a MVC reseller to be a HP partner and that the respondent was riding on the addendum as an affiliate. Once Sunlight's appointment as HP partner was terminated, the respondent's position as MVC reseller had to cease. Although it may have been a long-standing relationship, the fact of the matter is there was a new policy in 2011/2012 introduced by HP region that all MVC resellers were required to be a HP partner. There was then a restructuring of the MVC program in 2013 where a LA was required and this was agreed to by the respondent. The LA would form the contractual basis henceforth. There was no necessity to imply any duty of good faith and in particular, a further two years extension, was contrary to the terms of duration, as was set out earlier.

[81] The issue of the respondent being booted out to make way for Sundata was not proven as there was no evidence that DW2 who had the purported relationship with someone in Sundata played a part in deciding on the respondent's termination or that Sundata was given the contracts meant for the respondent.

[82] The commercial relationship between the parties was non-exclusive as clearly stated in the LA. This meant there were other MVC resellers appointed with similar terms of appointment and all were required to purchase HP products from authorised distributors or risk being terminated. Hence there was no special relationship where the first appellant reposed trust that the respondent will not contaminate the market by selling counterfeit products.

[83] We find that the facts of this case did not warrant a duty of good faith to be implied into the contract.

Conclusion

[84] We therefore allowed the appeal and set aside the decision of the High Court Judge. We did not think it necessary to consider the issue of damages. Costs of RM110,000 here and below was awarded to the appellants subject to allocator.